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No. 88-1382

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EAGLE-PICHER INDUSTRIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF FOR PETITIONER EAGLE-PICHER INDUSTRIES, INC.

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Eagle-Picher's petition and GAF's *amicus* brief demonstrate the importance of this case and the significance of the legal issues involved. In its opposition, the United States has not tried to minimize either. Instead, the United States has sought to make the legal issues involved seem more complex than they are. Nothing the United States has argued detracts from the reasons for granting certiorari advanced in Eagle-Picher's petition. Contrary to the government's attempt to rewrite the decisions of this Court, and of the Second, Fifth, and Ninth Circuits, there is a very significant conflict in

precedent concerning the "maritime nexus" issue raised by Eagle-Picher's vessel-owner claims under the FTCA.

1a. The government misreads this Court's decision in *Director, Office of Worker's Compensation Programs v. Perini North River Assoc.*, 459 U.S. 297 (1987), and mischaracterizes the admiralty jurisdiction issue involved in this case.[1] Although *Perini* involved a worker's compensation claim under the LHWCA, the Court's decision did not turn on an interpretation of any provisions of the Act specific to compensation. Instead, the Court's decision turned on the definition in the LHWCA of who was a covered "maritime employee." Section 905(b) by its terms extends to "persons covered under this Chapter," and therefore, under *Perini*, to any "worker . . . injured on the actual navigable waters in the course of his employment on those waters. . . ." 459 U.S. at 324.

Moreover, *this* Court's decision vacating and remanding *McCarthy v. The Bark Peking*[2] to the Second Circuit in light of its ruling in *Perini* clearly extends the scope of *Perini* to the Section 905(b) context. On remand, the Second Circuit squarely held, in light of *Perini*, that the injured maritime employee, having estab-

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[1] Eagle-Picher's third-party claim does not raise the question whether admiralty jurisdiction exists over the *product liability* claims of land-based workers against *asbestos product manufacturers*, a question most courts have decided in the negative. Instead, Eagle-Picher's claim raises the question whether jurisdiction exists over the Section 905(b) vessel-owner claim of an LHWCA-covered maritime employee injured on board a vessel in navigable waters by the vessel's negligence while the employee was engaged in his maritime employment. On *this* question—which is the question presented by the facts of this case—there is ample appellate precedent in the Second, Fifth, and Ninth Circuits directly on point and *in direct conflict* with the Federal Circuit's holding and the government's argument.

[2] 676 F.2d 42 (2d Cir. 1982), *vacated and remanded*, 459 U.S. 1166 (1983), *on remand*, 716 F.2d 130 (2d Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984).

lished the *situs* of his injury on board a vessel in navigable waters and his *status* as an LHWCA-covered maritime employee, could, *without more*, proceed to "bring his action for damages under 33 U.S.C. § 905(b) (1976)." 716 F.2d at 132. The government does not contend that *The Bark Peking* presents no conflict with the decision below; instead the government merely speculates that perhaps the Second Circuit "was not asked" and therefore "did not consider" whether an independent maritime nexus *in addition to* the situs and status of *Perini* may be required for a Section 905(b) action. Gov't Opp. at 11. However, the fact remains that the Second Circuit did *not* require any additional independent showing. The Second Circuit's decision is thus in direct conflict with the decision below.[3]

b. The government also argues that it is immune to third-party contribution claims in Washington and all states that don't recognize the possibility of liability for contribution in the absence of common liability among

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[3] The situation in the Ninth Circuit is precisely parallel. In *Cook v. Exxon Shipping Co.*, 762 F.2d 750 (9th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986), the Ninth Circuit authorized a Section 905(b) suit by a land-based iron worker killed in an explosion while temporarily aboard a vessel to make repairs. Once the court had satisfied itself that the worker was an LHWCA-covered "maritime employee" and the injury occurred aboard a vessel on navigable waters, the court upheld the Section 905(b) cause of action. 762 F.2d at 751-52 and n.3. Once again, the government can only speculate that perhaps "no issue concerning the maritime nexus of the alleged tortious behavior was raised." Gov't Opp. at 11.

The government's attempt to distinguish *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982), is no more successful. Although *Perkins* did not involve a Section 905(b) vessel-owner cause of action, it *did* involve the question whether admiralty jurisdiction existed over the injured worker's claim. On that point, the Ninth Circuit expressly held that the injured worker's "status" as an LHWCA-covered maritime employee "alone constitutes a sufficient nexus to traditional maritime activity to create admiralty jurisdiction in this case." 673 F.2d at 1101.

joint tortfeasors. The government asserts that, because Mr. Lopez, a government employee, is barred by FECA's exclusivity provision, 5 U.S.C. § 8116(c), from suing the United States as his employer for any injuries he received as a result of his employer's negligence, a third party is similarly barred unless state law allows contribution in the absence of common liability.

There are a number of problems with this argument, even at its most rudimentary level. First, it ignores the FTCA's mandate to assess the United States' susceptibility to tort liability as though it were a "private individual under like circumstances." 28 U.S.C. § 2674. Second, it ignores the fact that, in the Ninth Circuit, the United States has been held subject to a Section 905(b) vessel-owner claim *even by one* of its *own* employees. *Normile v. Maritime Co. of the Philippines*, 643 F.2d 1380, 1382 n.2 (9th Cir. 1981).[4] Third, the argument, if adopted, would make this Court's holding in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983), that a claim for third-party contribution is *not* barred by FECA's exclusivity provision, completely meaningless.

The government's only answer is to assert that the FTCA's's language, requiring analogy to a "private individual under like circumstances" means "a private individual under like [*legal*] circumstances"; that is, that "immunity to direct suit by the underlying plaintiff is a circumstance that may not be ignored." Gov't Opp. at 12. But reading the FTCA language as the government proposes would, in the words of Judge Pollak in *Colombo v. Johns-Manville Corp.*, 601 F. Supp. 1119, 1128 (E.D. Pa. 1984), "nullify the phrase . . . 'private individual'" rather than "modify it." Judge Pollak continued:

> It is of course possible to argue that FECA is one of the "circumstances" which define the liability of

[4] As the Federal Circuit acknowledged, it is bound by Ninth Circuit precedent for the tort claims involved in this case. Pet. App. at 4a; *Atari, Inc. v. JS&A Group, Inc.*, 747 F.2d 1422 at 1439-40 (Fed. Cir. 1984).

> the United States as a shipyard employer; FECA does not, however, apply to a "private individual." Applying FECA would therefore be facially inconsistent with the language of the FTCA.

601 F. Supp. at 1128.[5]

The two Ninth Circuit cases relied upon by the government, *La Barge v. Mariposa County*, 798 F.2d 364 (9th Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987), and *Bell Helicopter v. United States*, 833 F.2d 1375 (9th Cir. 1987), *actually support petitioner* here and are in direct conflict with the approach of the Federal Circuit below. In both cases, the Ninth Circuit analogized the United States as an employer to a *private* employer covered *not by* FECA but by the applicable *state* workers' compensation laws. As the court in *La Barge* explained, the FTCA—

> direct[s] the courts to analogize the government to a *private actor* in a similar situation and *apply state law* to determine amenability to suit and substantive liability.

798 F.2d at 366 (emphasis supplied). Accordingly, the court continued, "the United States should be entitled to the same immunity from suit enjoyed by a *private employer covered by state workmen's compensation laws.*" 798 F.2d at 367 (emphasis supplied). Yet, the government here seeks to analogize to a non-existent fictitious entity—a private employer cloaked with the government's unique immunities. *La Barge* clearly holds that

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[5] As explained in Eagle-Picher's petition, all the district courts to have considered Eagle-Picher's third party contribution claims, with the exception of the district court in this case, uniformly rejected the government's argument on this issue and upheld Eagle-Picher's vessel-owner cause of action. Petition at 10, 11, n.10 & n.12.

The government's reliance on *United Airlines v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964), is misplaced. That case did not involve any possibility of a "dual capacity" action, such as the Section 905(b) action involved here.

the "like circumstances" test requires analogy to a private employer with the *private employer's* immunities and defenses.

2. With respect to the Tucker Act issues, the government attempts to sweep under the rug the Federal Circuit's reliance on extra-record "facts" adverse to petitioner in the context of an appeal of a Rule 12(b)(6) motion to dismiss. The government disingenuously argues that "factual questions do not call for review by the court," Gov't Opp. at 16, neglecting to acknowledge that there are *no* "factual questions" properly at issue on a Rule 12(b)(6) motion. Eagle-Picher's petition is addressed to the Court's supervisory power to compel the Federal Circuit to follow the long-established rules for appellate review of orders on motions to dismiss the pleadings under Fed. R. Civ. P. 12(b)(6). Instead of accepting the truth of the allegations of the complaint—which was the only record it had before it—the Federal Circuit avowedly based its decision on factual findings predicated on a series of speculations, presumptions and assumptions.

The government's attempt to characterize the basis of the Federal Circuit's decision as something other than its extra-record "finding" that petitioner's contract specifications were "performance" specifications instead of "design" specifications can be easily laid to rest. It takes only a few moments to read the court's discussion of this issue. Pet. App. at 6a-9a. In the context of that discussion, and especially at 8a, it is clear that the linchpin of the court's decision is simply that "a *Spearin*-type warranty is implied only in design specifications, not performance specifications." *Id.*[6]

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[6] Whether or not petitioner also made available to commercial users the same product it designed for the military pursuant to military specifications (i) is inappropriate judicial speculation in the absence of a record; and (ii) would be irrelevant to the question of breach of the government's warranty of the safety and suitability of the specifications in any event.

Perhaps most misleading of all, and worthy of particular attention, is the government's contention that Eagle-Picher's Tucker Act claims against the United States are "in essence" claims "for implied reverse warranty." Gov't Opp. at 16.[7] Nothing could be further from the truth. The *only* Tucker Act claims presented to the Federal Circuit for its review were the "specification-warranty" and "superior knowledge" claims. Both types of claims are well-established in government contract law and amply supported by extensive precedent, including this Court's own precedent.

The "specification warranty" claim arises whenever the United States breaches its implied warranty of the safety and suitability of mandatory contract specifications. *E.g.*, *United States v. Spearin*, 248 U.S. 132 (1918); *USA Petroleum Corp. v. United States*, 821 F.2d 622 (Fed. Cir. 1987). In essence, it holds the government responsible for damages incurred by a contractor as a result of the contractor's reliance on the government's specifications mandating how the contractor is to perform its contract.

The "superior knowledge" claim arises whenever the government breaches its implied duty to reveal its superior knowledge of matters related to a government contract, affecting the contractor's costs and performance. *E.g.*, *Hardeman-Monier-Hutcherson v. United States*, 458 F.2d 1364 (Ct. Cl. 1972); *Helene Curtis Industries, Inc.*

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[7] Indeed, the government goes so far as to characterize one of the two questions presented by the petition as whether "third party actions against the United States" can "be maintained . . . on an implied reverse warranty theory." Gov't Opp. at I. However, no such question was before the Federal Circuit, and no such question is presented for the Court's review.

A claim similar to what the government has here characterized as an "implied reverse warranty" running from buyer to seller constituted one count of Eagle-Picher's complaint before the district court. However, denial of that one cause of action was not a basis for Eagle-Picher's appeal.

v. United States, 312 F.2d 774 (Ct. Cl. 1963). A "superior knowledge" claim, if proven, holds the government responsible for damages suffered by a contractor as a result of the government's withholding of information vital to the contract.

Neither claim has anything to do with an "implied reverse warranty" running from a buyer to a seller. The government's characterization of these arguments as relating primarily to an "implied reverse warranty" theory of recovery under the Tucker Act is a flight of fancy that only serves to underscore the government's inability to deal with the issues raised by the decisions below in a straightforward way.

The government's discussion of the military contractor defense elucidated in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), appears calculated to do nothing more than confuse the issue and is completely inappropriate in this context. Whether or not "the selection of the appropriate design for military equipment to be used by our Armed Forces is . . . a discretionary function," *Boyle*, 108 S. Ct. at 2512, *quoted* at Gov't Opp. at 17, has nothing whatever to do with the question whether Eagle-Picher can state a claim for *contract* damages under the Tucker Act. The discretionary function exception, where applicable, insulates the government only from *tort* liability. 28 U.S.C. § 2680(a). Congress' intent in insulating government policy makers from tort liability by means of the discretionary function exception to the FTCA cannot be magically transformed into an intent to bar contract damages under the Tucker Act.

3. In conclusion, petitioner suggests that the degree to which the government has been forced to resort to illogical, inconsistent, and frankly misleading arguments is the best illustration available of the importance of the issues presented by this petition and of the need for this Court's review. The issues involved may be difficult, but

they are not impossible to resolve in a principled, rational manner. That the lower courts have failed to do so to date is evident from even a cursory reading of the Federal Circuit's opinion in this case.

CONCLUSION

Eagle-Picher's petition for a writ of certiorari should be granted.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF GAF CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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BRIEF OF GAF CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

Pursuant to Rule 36 of the Rules of this Court and with the consent of all parties, GAF Corporation ("GAF") respectfully files this brief *amicus curiae* in support of the petition of Eagle-Picher Industries, Inc., for a writ of certiorari.

The petition seeks review of a Federal Circuit decision holding that direct and third-party suits against a vessel owner for negligence under Section 905(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA") 1/ cannot be maintained unless persons covered by the Act also are engaged in the "traditional maritime activities" which are a prerequisite to admiralty jurisdiction.

1/ 33 U.S.C. § 905(b)(1982). Unless otherwise indicated, references are to the Act as amended in 1972. The Act was amended again in 1984, but this action is governed by the pre-1984 statute.

The petition also seeks review of questions concerning the application of the Federal Tort Claims Act ("FTCA") [2/] to third-party claims against the United States seeking contribution for damages paid to federal employees.

The petition, in addition, asks this Court to exercise its supervisory powers over the Federal Circuit because of that Court's disregard of rudimentary limitations on the scope of appellate review in affirming the dismissal of petitioner's claims against the United States for contractual indemnification under the Tucker Act. [3/]

STATEMENT OF INTEREST OF AMICUS

GAF agrees with petitioner that, in affirming the dismissal of petitioner's Tucker Act claims, the Federal Circuit exceeded the bounds of appellate review and disregarded the long-established rules for evaluating a complaint challenged on a motion under Fed. R. Civ. P. 12(b)(6). GAF's interest as amicus, however, is limited to the questions raised by the petition with respect to the construction of the LHWCA and the application of the FTCA to third-party claims for contribution for damages paid to federal employees. The resolution of these two questions directly affects a pending suit by GAF against the United States brought in reliance on the FTCA and the LHWCA.

Petitioner's case seeks contribution and indemnification from the United States under the FTCA and the Tucker Act for amounts paid out in settlement to a former Government-employed shipyard worker. This shipyard worker is one of thousands of former shipyard workers claiming damages from asbestos manufacturers for injuries allegedly resulting from exposure to asbestos insulation products which these workers installed in, or removed from, U.S. Navy ships beginning in World War II.

These asbestos products were manufactured under specifications mandated by the United States, with the active encourage-

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2/ 28 U.S.C. §§ 1346(b), 2671-2680 (1982).

3/ 28 U.S.C. §§ 1346(a)(2), 1402 (1982).

ment of the United States, and from raw asbestos stockpiled and supplied by the United States. A Claims Court decision, since vacated on jurisdictional grounds, also determined that the United States undertook these activities with full knowledge of the hazards of asbestos to shipyard workers' health [4/] and two courts have found that the United States was negligent in failing to warn of the health hazards posed by asbestos. [5/]

Based on these facts GAF, like petitioner and other asbestos manufacturers, brought suits seeking to establish the Government's responsibility to help compensate these shipyard workers and to share the enormous economic burden which the manufacturers and their insurers have until now borne alone. GAF has pending in the United States District Court for the District of Columbia an action under the FTCA which seeks contribution and indemnification for amounts paid out both to Government-employed and privately-employed shipyard workers who made claims, similar to those involved in petitioner's case, for asbestos-related injuries incurred while working on U.S. Navy ships. [6/]

4/ *Johns-Manville* v. *United States*, 13 Cl. Ct. 72, 136-145 (1987), *vacated on other grounds*, 855 F.2d 1571 (Fed. Cir. 1988), *cert. denied*, 57 U.S.L.W. 3588 (U.S. Mar. 6, 1989) (No. 88-1052).

5/ *Dube* v. *Pittsburgh-Corning Corp.*, No. 88-1679, slip op. (1st Cir. Mar. 27, 1989); *Shuman* v. *United States*, Civ. No. 78-1407-S, slip op. (D. Mass., Skinner, J.), *rev'd on other grounds*, 765 F.2d 283, 284 (1st Cir. 1985). Although the trial court in *Shuman* found the United States responsible for injuries to plaintiff's decedent, the Court of Appeals in *Shuman* declined to impose liability on the United States because of the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1982). Subsequently, in *Dube*, the First Circuit found that in light of this Court's reasoning in *Berkovitz* v. *United States*, 108 S. Ct. 1954 (1988), the "discretionary function" exception did not shield the United States from liability for its failure to warn of the dangers of asbestos.

6/ *GAF Corporation* v. *United States*, No. 83-1322 (BDP) (D.D.C. filed May 6, 1983). GAF also has pending a separate action in the Claims Court which seeks indemnification from the United States under the Tucker Act based on the breach of implied contractual warranties, *inter alia*, under the doctrine of *United States* v. *Spearin*, 248 U.S. 132 (1918). *GAF Corporation* v. *United States*, No. 287-83C (Cl. Ct. filed May 5, 1983).

Like petitioner, GAF seeks, in its FTCA action, to impose third-party liability on the United States in its capacity as a vessel owner. Under the FTCA, the United States may be liable in tort "in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674 (1982). GAF, like petitioner, maintains that (1) a private vessel owner may be sued for negligence under Section 905(b) of the LHWCA by employees covered under the Act, (2) a third-party action could be brought against such a private vessel owner for contribution based on injuries to such an employee caused by the vessel owner's negligence and, accordingly, (3) asbestos manufacturers, like petitioner or GAF, can maintain such third-party suits against the United States in its capacity as a vessel owner. 7/

The Federal Circuit rejected this analysis in petitioner's case. Adopting the reasoning of a prior First Circuit decision, 8/ the Federal Circuit held that vessel owner liability under Section 905(b) of the LHWCA furnished no predicate for petitioner's third-party claims because the employee was not engaged in "traditional maritime activity" — a prerequisite for admiralty jurisdiction which the Federal Circuit read into the LHWCA.

7/ For suits based on injuries prior to the 1984 amendment to the LHWCA, a negligence action can be brought against a vessel owner which also functions in the "dual capacity" of employer of the injured employee. *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523 (1983). For injuries after the 1984 amendment, suits under Section 905(b) can no longer be brought against a vessel owner who is also the plaintiff's employer. *See* 33 U.S.C. § 905(b) (Supp. 1986). The employee whose claims underlie the third-party suit brought by petitioner was an employee of the vessel owner, but his injuries were suffered prior to 1984. Thus, his claims are unaffected by the 1984 amendment which applies only to "any injury after the date" of that amendment. 33 U.S.C. § 901, note concerning Effective Date of 1984 Amendment (Supp. 1986). There are tens of thousands of outstanding claims still governed by the 1972 Act which are unaffected by the 1984 amendments. Moreover, suits brought by GAF and others also are based on claims of employees of private shipyards or private subcontractors injured by the United States in its capacity as vessel owner. None of those claims would be affected by the 1984 amendments, even if they involve injuries after 1984, because they do not involve the United States acting in the "dual capacity" of an employer.

8/ *Drake* v. *Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986).

The importation of this admiralty jurisdiction requirement into the LHWCA was rejected by this Court in *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, 459 U.S. 297 (1983) (*"Perini"*). The Federal Circuit's construction of the LHWCA also conflicts directly with a decision of the Second Circuit. 9/ Unless this conflict is resolved and the Circuit Courts are directed to follow *Perini*, the Federal Circuit–First Circuit view could adversely affect GAF and other manufacturers of asbestos in pending FTCA suits predicated on the Government's vessel owner liability under the LHWCA. More broadly, it could affect all workers covered by the Act by severely restricting their right to sue a vessel owner for negligence.

The Federal Circuit also intimated that the third-party suit brought by petitioner failed because it was predicated on the underlying claims of a *federal* employee. The Federal Circuit read the provision of the LHWCA which excludes federal employees from the coverage of the workers' compensation provisions of this Act, as expressing an intention also to bar federal employees from suing the Government under the vessel owner provisions of Section 905(b) of the Act. The Federal Circuit was "inclined to believe" that such a bar to direct suits by federal employees against the Government also barred third-party suits against the Government, predicated on the underlying claims of such federal employees. App. 18a–19a. 10/ The district court reached a similar conclusion based on the provision of the Federal Employees' Compensation Act ("FECA") 11/ which

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9/ *McCarthy* v. *The Bark Peking*, 716 F.2d 130 (2d Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984) (this decision was on remand to the Second Circuit from this Court in *McCarthy*, 459 U.S. 1166 (1983), *vacating* 676 F.2d 42 (2d Cir. 1982)).

10/ "App." refers to the Appendix to Eagle-Picher's Petition.

11/ 5 U.S.C. § 8116(c) (1982) provides:

> The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled
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> (continued)

bars suits against the United States by a federal employee for injury or death. [12/]

These constructions would directly affect GAF's third-party suit insofar as it is based on injuries to federally-employed shipyard workers. More significantly, if these constructions prevailed, they would eliminate all third-party suits under the FTCA predicated on damages paid to federal employees.

GAF supports petitioner's request for review of these constructions. They fly in the face of the plain language of the FTCA which required the Court below to analyze the claim against the United States as if it had been brought against a *private* vessel owner. These constructions also conflict with this Court's decision in *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983) ("*Lockheed*"), which held that FECA's bar to direct suits by federal employees was *not* a bar to third-party suits predicated on their injuries.

SUMMARY OF ARGUMENT

Review is warranted to assure that all of the Circuits follow this Court's holding in *Perini* that LHWCA coverage is not limited to employees engaged in "traditional maritime activities" but extends to all "employees" as defined in Section 902(3) of the Act. The Federal Circuit has now joined the First Circuit in deviating from this teaching, and these two Circuits are in direct conflict with the Second Circuit as well. The proper resolution of this conflict is of great importance not only to asbestos manufacturers or other parties with third-party claims against the United States predicated on the LHWCA, but to all employees covered by the Act.

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> to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

12/ App. 30a-32a.

To the extent the Federal Circuit barred petitioner's third-party suit on the ground that it was predicated on injuries to federal employees who could not bring a direct action against the United States, it misconstrues the "private party analogy" provision of the FTCA and is in conflict with this Court's decision in *Lockheed*. The question raised is one of importance to all third-party claimants under the FTCA with claims predicated on damages paid to federal employees.

ARGUMENT

I

REVIEW IS REQUIRED TO ASSURE THAT ALL CIRCUIT COURTS FOLLOW THE TEACHING OF THIS COURT'S DECISION IN *PERINI*

The Federal Circuit held that the employee whose underlying claim was the basis for petitioner's third-party suit could not have sued the vessel owner under Section 905(b) of the LHWCA because he was not engaged in "traditional maritime activities." The Federal Circuit thus read into the LHWCA the same limitation which this Court, in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972) ("*Executive Jet*"), imposed on admiralty jurisdiction. In so holding, however, the Federal Circuit simply ignored this Court's decision in *Perini*. [13/]

In *Perini*, a worker was injured while loading concrete blocks on a barge on the Hudson River. This Court specifically rejected arguments that the worker was not entitled to compensation under Section 902(3) of the LHWCA because he was not engaged in the type of "traditional maritime activities" required for admiralty jurisdiction by *Executive Jet*. Instead, this Court held:

> [W]hen a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § [902(3)] and is covered under the LHWCA, providing, of course, that he is the employee of a

13/ 459 U.S. 297 (1983).

statutory "employer," and is not excluded by any other provision of the Act. We consider these employees to be "engaged in maritime employment" not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters.

459 U.S. at 324 (footnote omitted). [14/]

In rejecting the application of the *Executive Jet* requirements to the LHWCA, this Court noted that:

[T]he only issue before the Court [in *Executive Jet*] was whether federal admiralty jurisdiction extended to tort claims arising out of the crash of an airplane into navigable waters. . . . Although the term "maritime" occurs both in 28 U.S.C. § 1333(1) and in § [902(3)] of the Act, these are two different statutes, "each with different legislative histories and jurisprudential interpretations over the course of decades."

459 U.S. at 320 n.29 (citation omitted).

14/ The Act defines "employee" as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. § 902(3) (1982). The Act defines "employer" as follows:

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. § 902(4) (1982). There is no dispute that if they were private parties, the employee in petitioner's case and his employer would fall within these definitions.

The plain language of Section 905(b) shows that the holding of *Perini* applies with equal force to suits against vessel owners brought under that section of the LHWCA. Section 905(b) provides:

> In the event of injury to a person *covered under this chapter* caused by the negligence of a vessel, then such person or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party. . . .

33 U.S.C. § 905(b) (1982) (emphasis supplied). As *Perini* establishes, an employee is "covered" by the LHWCA so long as the employee is required to perform his or her duties on navigable waters.

The conclusion that *Perini* applies equally to cases brought under Section 905(b) is reflected in this Court's vacation of the judgment and remand in *McCarthy* v. *The Bark Peking*, 459 U.S. 1166 (1983). In *McCarthy*, the Second Circuit initially held that a worker making repairs to a museum ship docked on the East River was not engaged in "maritime employment," 676 F.2d 42, 45 (2d Cir. 1982), and thus could not state a claim under Section 905(b). This Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of *Perini*. On remand, the Second Circuit held that, in view of *Perini*, since McCarthy was at work on a vessel upon navigable waters, he was an "employee" under the provisions of Section 902(3) of the LHWCA. As a covered employee, the court found that he was entitled to bring an action for the negligence of a vessel under Section 905(b) of the Act. 716 F.2d 130, 132–133 (2d Cir. 1983). Thus McCarthy was not required to show an additional nexus to traditional maritime activity in order to assert his Section 905(b) action.

Thus, the Federal Circuit, and the First Circuit on whose reasoning the Federal Circuit relied, [15]/ are in conflict with this Court

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15/ *Drake* v. *Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986); App. 17a. The Fifth Circuit, in an *en banc* decision, concluded that an action under Section 905(b) must meet the requirements for admiralty jurisdiction, including the requirement of a maritime nexus. But the only question before the court was whether a "vessel" under Section 905(b) is the same as a "vessel" for purposes of admiralty jurisdiction. The court was not asked to decide whether an "employee" (continued)

and the Second Circuit. Review is required to resolve this conflict and assure adherence to this Court's construction of this federal statute which affects not only third-party claimants like GAF and petitioner, but thousands of workers covered by the Act.

II

REVIEW IS NEEDED TO ASSURE THE CORRECT APPLICATION OF THE FTCA TO THIRD-PARTY CLAIMS AGAINST THE UNITED STATES SEEKING CONTRIBUTION FOR DAMAGES PAID TO FEDERAL EMPLOYEES

The Federal Circuit's conclusion that suits under Section 905(b) of the LHWCA must meet the admiralty test for "traditional maritime activities" would limit both direct and third-party suits predicated on Section 905(b), even where they involved a private vessel owner sued by private employees. The Federal Circuit, however, made the following additional observations, which would apply a separate bar to third-party suits against the United States based on claims of *federal* employees:

> The First Circuit passes over, as can we, whether an unequivocal consent to liability of the United States is expressed with respect to indemnification or contribution against claims by federal workers, where the LHWCA itself provides in 33 U.S.C. § 903(b) [§ 90[3](a)(2) before 1984]:
>
> > No compensation shall be payable in respect to the disability or death of an officer or employee of the United States or any agency thereof.
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> As to this, we meet ourselves coming back as appellant refers us, of course, to the case of the private shipowner postulated under the FTCA whose employees are not federal employees. But if consent to indemnification claims is granted at all, under

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meeting the requirements of Section 902(3) of the LHWCA would also satisfy the test of admiralty jurisdiction. *Richendollar* v. *Diamond M. Drilling Co.*, 819 F.2d 124 (5th Cir.), *cert. denied*, 108 S. Ct. 331 (1987).

> these circumstances, it is surely not granted unequivocally. *Cf. United States* v. *Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 953-954, 47 L. Ed. 2d 114 (1976). We are inclined to believe that a suit for indemnification or contribution for liabilities incurred to federal employees for their breathing of asbestos, is unconsented even when the LHWCA is read with the FTCA to refer to a private employer.

App. 18a-19a.

Thus, the Federal Circuit believed that a third-party suit based on Section 905(b) of the LHWCA could not be brought against the United States to obtain contribution for damages paid to federal employees because, as the Court read the LHWCA, federal employees could not bring direct suits against the United States under Section 905(b). The district court reached a similar result as to third-party suits based on the bar against direct suits by federal employees against the United States for injury or death contained in FECA. [16/] The Third Circuit has endorsed both these views. [17/] The First Circuit has indicated its agreement with the approach taken by the Federal Circuit based on the supposed LHWCA bar but has rejected the district court approach based on FECA. [18/]

It is a moot point whether the exclusion of federal employees from the workers' compensation provision of the LHWCA also excludes them from Section 905(b), [19/] because federal employees could not sue the United States as a vessel owner since *FECA* (with one exception not applicable here) bars *all* federal employee suits against

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16/ App. 30a-32a.

17/ *Eagle-Picher* v. *United States*, 846 F.2d 888, 890, 893 n.8 (3d Cir.), *cert. denied*, 109 S. Ct. 490 (1988).

18/ *In re All Maine Asbestos Litigation (PNS)*, 772 F.2d 1023, 1028, 1029 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986).

19/ *See In re All Maine*, 772 F.2d at 1029; *Eagle-Picher*, 846 F.2d at 890. The exclusion appears only in the section of the LHWCA defining workers' compensation coverage. 33 U.S.C. § 903(a)(2) (1982). The First, Third and Federal Circuits nevertheless read it to apply to suits brought by federal employees against the United States as vessel owner pursuant to Section 905(b). However, none of these courts carry their reading of the

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the United States for injury or death. But the FECA bar (or any similar bar supposedly implicit in the LHWCA) to suits by federal employees is wholly irrelevant to the separate question whether a *third-party* claim based on damages paid to a federal employee can be brought against the United States under the FTCA.

The FTCA imposes liability on the United States for tort claims "in the same manner and to the same extent as a private individual under like circumstances. . . ." [20/] Under the FTCA, the appropriate inquiry, therefore, is whether a *private* vessel owner could be sued by its employee. The Federal Circuit was willing to entertain the conundrum that a third-party suit was barred by a supposed LHWCA bar to direct suits by *federal* employees "even when the LHWCA is read with the FTCA to refer to a private employer." App. 19a. Meanwhile the district court and the Third Circuit believed that a private employer in "like circumstances" was a nonexistent private employer protected against direct suits by FECA. [21/] In other words, each of these lower courts has circumvented the direction of the FTCA to analogize the United States to a private party by simply positing a chimerical private party who has the immunities of the United States. This sleight-of-hand renders the FTCA meaningless.

It also deprives this Court's decision in *Lockheed* of all meaning. In *Lockheed*, this Court held that the FECA bar to direct suits by federal employees against the United States did not bar third-party suits. [22/] The Court, of course, said in *Lockheed* that the exis-

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Act to its logical conclusion that federal employees are barred from suing even for injuries inflicted by the negligence of a private vessel owner. Such a conclusion would conflict with the view held by the Ninth Circuit that such an action by a federal employee does lie under Section 905(b). *Normile* v. *Maritime Co. of the Philippines*, 643 F.2d 1380, 1382 n.2 (9th Cir. 1981).

20/ 28 U.S.C. § 2674 (1982).

21/ App. 32a; *Eagle-Picher*, 846 F.2d at 893 n.8. The phrase "like circumstances" simply means "circumstances like unto those in which a private person would be liable . . . ." *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955).

22/ 460 U.S. 190, 199 (1983).

tence of a third-party claim would have to be established independently under the applicable substantive law. But to conclude, as did the district court here and the Third Circuit, that the FECA bar to direct suits by a federal employee deprives third parties of any such substantive cause of action is a form of Catch-22 which makes *Lockheed* a nullity.

GAF recognizes that this Court has so far declined to review these issues concerning the relationship between the LHWCA, FECA and the FTCA raised by prior Circuit Court decisions. [23/] However, none of these decisions can withstand rational analysis. They represent a misreading of all three statutes and a disregard of the principles enunciated by this Court in *Lockheed*. Petitioner correctly points out that these Circuit Court decisions stand in sharp contrast to the careful analyses by Judges Pollak, Gignoux and others, reaching contrary conclusions at the district court level. [24/]

Certiorari should be granted to review these important questions pertaining to the availability of third-party suits under the FTCA predicated on underlying injuries suffered by federal employees.

23/ *Eagle-Picher* v. *United States*, 846 F.2d 888 (3d Cir.), *cert. denied*, 109 S. Ct. 490 (1988); *Drake* v. *Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986); *In re All Maine Asbestos Litigation (PNS)*, 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986).

24/ *Eagle-Picher Industries, Inc.* v. *United States*, 657 F. Supp. 803 (E.D. Pa. 1987) (Pollak, J.), *rev'd*, 846 F.2d 888 (3d Cir.), *cert. denied*, 109 S. Ct. 490 (1988); *In re All Maine Asbestos Litigation (PNS)*, 589 F. Supp. 1571 (D. Me. 1984) (Gignoux, J.), *aff'd in part, vacated in part*, 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986); *see* Pet. 10 n.10.

CONCLUSION

GAF therefore urges the Court to grant certiorari on the questions raised in the petition relating to the construction of the LHWCA and to the application of the FTCA to third-party claims against the United States seeking contribution for damages paid to federal employees.

Respectfully submitted,

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